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No. 85-1797

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARLENE MACK, ET AL., PETITIONERS

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that military regulations prohibiting the enlistment of single parents who maintain custody of minor children are unconstitutional because the regulations violate fundamental family rights.

1. Since the mid-nineteenth century, the military has limited the peacetime enlistment of persons with dependents. The military regulations have varied in

content in recent years. In 1972, the Army and the Air Force amended their enlistment policies to permit enlistment of single parents with minor children, but both services experienced a decline in readiness and mobility as the result of those amendments. The Air Force (in 1974) and the Army (in 1975) therefore returned to their earlier practice and adopted regulations prohibiting the enlistment of single parents who maintain custody of minor children (Pet. App. A45-A48, A52-A55). In 1978, the Air Force again experimented with a policy permitting the enlistment of single parents on a case-by-case basis, yet it once again experienced readiness and deployment difficulties as a result. The Air Force in 1982 accordingly reinstituted its ban on single parent enlistment. The Army and Air Force regulations currently in effect prohibit the enlistment of single parents having custody of minor children (*id.* at A49-A51, A55-A56).

Petitioners are female single parents who were denied enlistment in the Army, Army Reserve, Air Force, or Air Force Reserve. In 1976, they brought this class action in the United States District Court for the Western District of New York challenging the constitutionality of military regulations prohibiting the enlistment of single parents having custody of children under 18 years of age. Petitioners challenged these regulations inter alia on the grounds that they constitute unlawful gender discrimination and interfere with fundamental family rights (Pet. App. A5). Following extensive discovery, the district court granted the government's motion for summary judgment (*id.* at A2-A44). The court accepted petitioners' contention that the military regulations are subject to judicial review, but it nonetheless held that

the ban on single parent enlistment meets constitutional standards. The court rejected petitioners' argument that the regulations interfere with their constitutional right to have a family, noting that the regulations "simply prohibit plaintiffs, as single parents, from enlisting in the Army or [the] Air Force" and that "[t]here is no constitutional right to join the military" (*id.* at A15). The court concluded that the enlistment restrictions are reasonable national defense measures and that the record supports the military's concerns about readiness of deployment and mobility (*id.* at A37). The court of appeals unanimously affirmed in a per curiam decision, "substantially for the reasons set forth in [the district court's] opinion" (*id.* at A60).

2. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on the question presented. There is no conflict with any decision of this Court and no other reason warranting further review.

This Court has repeatedly recognized that " 'the military is, by necessity, a specialized society separate from civilian society.' " *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 3 (quoting *Parker* v. *Levy*, 417 U.S. 733, 743 (1974)). Accordingly, judicial review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society," and "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" (*Goldman*, slip op. 4). In this case, the Armed Services have determined, based on actual experiments designed to test the feasibility of single parent enlistment, that single parents generally are unable to

meet the stringent requirements of military readiness and deployment. The military's considered professional judgment on this matter is entitled to respect.[1]

The military's prohibition against single parent enlistment does not result in an unconstitutional burden on petitioners' right to raise a family, the sole burden of which petitioners now complain (see Pet. i). This Court has held that certain family-based decisions do enjoy constitutionally protected status. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (invalidating a state statute banning interracial marriage). When the government seriously intrudes on basic choices concerning the composition of the family unit, the Court has "examine[d] carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977). But such scrutiny has been applied only when the government regulation, at a minimum, "directly and substantially" interferes with family choices. *Lyng* v. *Castillo*, No. 85-250 (June 27, 1986), slip op. 3; *Zablocki* v. *Redhail*, 434 U.S.

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[1] The record in this case amply supports the military's restrictions on single parent enlistment. The Army and the Air Force have shown, through documentary evidence and deposition testimony, that their enlistment limitations are necessary to maintain the military's mobility and readiness requirements. See Pet. App. A16-A22. Members of the Armed Services must be ready for immediate deployment in distant places, often at a moment's notice. Single parents with responsibility for children present unacceptable deployment problems. The military has not reached this conclusion through mere speculation. The military's actual experience during 1972 and 1978, when single parent enlistment was temporarily allowed, has verified the difficulties resulting from that policy as well as the impracticality of alternative solutions (*ibid.*).

374, 386-387 & n.12 (1978); *Califano* v. *Jobst*, 434 U.S. 47, 58 (1977). In this case, the military has not taken any action that in any way interferes with an individual's choices about having a family, not having a family, or raising a family as he or she sees fit. Petitioners remain free to have and raise children as single parents. The Armed Services have simply established the absence of "single parenthood" as one among the many enlistment qualifications that reflect the unique needs of the military. And even if these enlistment restrictions were thought to infringe some fundamental right, the military's interest in maintaining our national defenses would amply justify the restriction. The military can properly limit enlistment to persons who, in its judgment, can meet its necessarily stringent standards of readiness and mobility.[2]

Finally, petitioners argue somewhat confusingly (Pet. 28) that their family-rights claim "has received no review at all from any court." To the contrary, the district court found petitioners' family-rights claim justiciable (Pet. App. A5-A14)[3] and

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[2] Petitioners argue that a "constitutionally acceptable alternative to respondents' present regulations would be individualized screening of single parents through the enlistment process" (Pet. 23). However, this Court's precedents permit the military, like other governmental bodies, to develop policies and draw lines based on reasonable generalizations (*Goldman*, slip op. 6). In any event, the Air Force has already tried a case-by-case approach to single parent enlistment and has found that approach unsatisfactory. See page 2, *supra*. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 767-785 (1975).

[3] In so holding, the district court rejected the government's contention that petitioners' challenges were nonjusticiable (Pet. App. A7-A9), a position supported by precedent from other circuits. See *Lindenau* v. *Alexander*, 663 F.2d 68 (10th

rejected it on the merits (*id.* at A15). The court of appeals affirmed "substantially for the reasons set forth in [the district court's] opinion" (*id.* at A60). The relative brevity of the courts' analysis of petitioners' family-rights claim—one of three constitutional challenges that petitioners proffered below—undoubtedly reflects an evaluation of the claim's insubstantiality.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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Cir. 1981); *West* v. *Brown*, 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978). But see *Dillard* v. *Brown*, 652 F.2d 316 (3d Cir. 1981) (holding that a similar constitutional claim was justiciable).

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